AN OVERVIEW

ON THE EXISTING STATUTES FOR

AMENDMENT AND REFORM

IN LINE WITH THE NEW CONSTITUTION OF KENYA

International Center for
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1. INTRODUCTION

The Kenya Constitution 2010 is the supreme law of Kenya. The promulgation of this new Constitution was a great historic moment for Kenya. It marked the end of a twenty-year struggle for reforms. Over 67% of Kenyan voters approved this new Constitution in a referendum held on 4th August 2010.[1]

The New Constitution came into effect on the 27th of August 2010 (the "Effective Date"). It is the culmination of almost two decades of constant pushes for a new Constitutional dispensation and one failed referendum held in 2005.[2] The New Constitution brings with it significant changes to the political system of governance of Kenya, expands the rights and fundamental freedoms, and introduces a new system of public finance among other changes.[3]

At last, Kenya began its transition to good governance, characterized by democracy, public participation, accountability, equity, equality and adherence to the rule of law.[4] For many decades Kenya had been grappling with a moribund of challenges with regards to issues of democracy, rule of law, equity and equality. The Constitution provides the greatest opportunity to the people of Kenya to advocate for their rights founded on the provisions of the Constitution and also welcome in a new era of institutional overhaul.[5]

The International Center for Policy and Conflict (ICPC) has focused its attention to ensuring the full implementation of the Constitution in order to enhance justice and accountability. However, there exist key challenges to the implementation of the Constitution. These include misinterpretation of the Constitution and cases of impunity by various institutions and government departments. These challenges among others have resulted in blatant violation of the Constitution and also the enactment of unconstitutional laws.

ICPC has invested in extensive research and monitoring to ensure that all the legislation governing the following thematic areas: security and administrative sector; Public funds sector; Access to justice and rule of law sector; the crimes against people and property, and penalty associated with them; state and the executive branch; conforms to the letter and spirit of the Constitution.

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1 Kenya Information Guide, *The Kenyan Constitution* http://www.kenya-information-guide.com/kenya-constitution.html accessed on 31/12/2011.

2 Waki A. and Gituro W. *The New Constitution of Kenya: A General Overview* at http://www.coulsonharney.com/LawArticles/Documents/The%20New%20Constitution%20-%20Overview.pdf Accessed on 31/12/2011.

3 Ibid.

4 Kenya Human Rights Commission, *Bills Update: Issue No. 002,* 2011.

5 Ibid.

As highlighted above, the Constitution is the supreme law of the land and any other law that is inimical to the postulates of the Constitution is null and void to the extent of its inconsistency. This principle is recognized by the Constitution of Kenya in Article 2 where it is provided that:

> ***Article 2 (1).*** *This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.*
> *(4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.*

The philosophical foundation of the supremacy of the Constitution above was emphasized in the case of ***Njoya Vs Attorney General and 3 Others*** (No. 2)[6] where at page 282 Ringera J. stated:

And lest somebody wonder why, the supremacy of the Constitution proclaimed in section 3[7] is not explicable only on the basis that the Constitution is supreme law, the grundnorm in Kelsenian dictum; nay, the Constitution is not supreme because it says so: its supremacy is a tribute to its having been made by a higher power, a power higher than the Constitution itself or any of its creatures. The Constitution is supreme because it is made by they in whom the sovereign power is reposed, the people themselves.

It follows that any other law must be in accordance with the basic tenets upon which the Constitution is founded in order to pass the test of constitutionality.

After the promulgation of the new constitution, there can be identified four aspects with regard to legal reform to ensure that the existing acts of parliament are in line with the new Constitution. These are:

i. The need for new Legislation

ii. The need for amendment to existing laws

iii. The need for supportive legislation

iv. The need to meet deadlines spelled out by the Constitution

6 [2004] KLR 261

7 The Justice in this case was making reference to Section 3 of the repealed constitution, which has the same effect as Article 2 of the new Constitution, with regard to supremacy of the Constitution. Section 3 provided as follows "This Constitution is the Constitution of the Republic of Kenya and shall have the force of law throughout Kenya and, subject to section 47, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void-"

2. AIM OF THE RESEARCH

This research document is aimed at highlighting and discussing various existing statutes within the aforementioned thematic areas that require amendment or repeal to conform to the new Constitution, and within standards of human rights and democratic governance. The Constitution in its schedule six of the Constitution requires that all law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution. It follows that not only any new statute but even existing ones must be in tandem with the new Constitution. This provision elevates the constitution as a grand norm while confirming its trampling effect as a constitutive document.

3. ANALYSIS OF STATUTES REQUIRING AMENDMENTS

A. Under Chapter xiv: National Security

i.) National Police Service Act (No 30 of 2011)

The Police Service Act was enacted by parliament to make further provisions for the functions and powers of the National Police Service Commission; the qualifications and procedures for appointment; and for connected purposes.[8]

Section 4 of the National Police Service Act 2011 provides that;

> ***Section 4.*** *The National Police Service shall consist of such maximum number of officers as shall be determined from time to time by the National Security Council in consultation with the Commission.*

Section 4 violates Article 246 (3) of the Constitution which provides that;

> ***Article 246 (3).*** *The Commission shall— (a) recruit and appoint persons to hold or act in offices in the service, confirm appointments, and determine promotions and transfers within the National Police Service;.*

Article 246 (3) therefore gives the National Police Service Commission (NPSC) the overall control over the recruitment and appointment and deployment of members of the Service and therefore Section 4 of the Act should be amended to provide that "The maximum number of officers shall be determined by the National Police Service Commission in consultation with the National Security Council."

8 See, *The National police Service Act 2011*, preamble

Section 5 of the Act violates the gender; ethnic and regional balance principles in Articles 27(8) and 246(4) of the Constitution. These principles are intended for immediate realization and not progressive realization as can be inferred from Section 5 which reads as follows;

> ***Section 5 of the National Police Service Act.*** *The composition of the Service shall, so as far is reasonably practicable—*
> *(a) uphold the principle that not more than two-thirds of the appointments shall be of the same gender; and (b) reflect the regional and ethnic diversity of the people of Kenya.*

The use of the phrase ***"so far as is reasonably practicable"*** implies that this provision is intended for progressive realization. It should be amended to ensure that it conforms with Articles 27 (8) and 246 (4) of the Constitution which provides as follows;

> ***Article 27 (8). of the Constitution*** *provides, In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.*
>
> *Article 246 (4). The composition of the National Police Service shall reflect the regional and ethnic diversity of the people of Kenya.*

These two provisions employ the word "shall" which implies that the provision is meant for immediate realization and not progressive realization as contemplated in section 5 of the Act.

Another provision which falls short of compliance with the Constitution is section 13 (7) which provide that;

> ***Section 13 (7).*** *For purposes of appointment of the Deputy Inspector General before the establishment of the Commission, the procedure set out in the Third Schedule shall apply, except that the provisions in the Schedule requiring approval by Parliament shall not apply.*

This particular section contradicts Article 245 (3) of the Constitution that provides for clear procedure for the appointment of Deputy Inspector General. It states that the Commission shall recommend Deputy Inspector General for appointment by the President.

> ***Article 245 (3).*** *The Kenya Police Service and the Administration Police Service shall each be headed by a Deputy Inspector-General appointed by the President in accordance with the recommendation of the National Police Service Commission.*

Section 13 (7) of the National Police Service Act is superfluous and should therefore be deleted as it serves no purpose.

Section 16 of the National Police Service Act 2011 which provides that;

> ***Section 16.*** *Where the Inspector-General is suspended from office under section 15 or incapable of performance of his or her functions, the President may appoint the Cabinet Secretary to act as the Inspector- General, for a period not exceeding three months.*

The section violates Article 245(2) (b) and (4) of the Constitution.

> ***Article 245 (2).*** *The Inspector-General—*
> *(b) Shall exercise independent command over the National Police Service, and perform any other functions prescribed by national legislation.*
> *(4). The Cabinet secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector-General with respect to—*

The Inspector-General has independent command over the service. To ensure the independence is maintained and noninterference by the executive, the replacement, in the absence of the Inspector-General, should be… by a Deputy Inspector General, appointed by the Commission. The provision under section 16 has also had the effect of prolonging the replacement, by the Cabinet Secretary, to three months. Section 16 should therefore be amended to cure this inconsistency.

Section 40 (7) of the Act violates Article 244 of the Constitution on promotion of transparency and accountability. It provides that each station shall have a facility to receive record and report complaints against police misconduct. This section is in utter contravention of Article 244 of the Constitution which provides that the National Police Service shall prevent corruption and promote and practice transparency and accountability. The provision should be amended to provide for reporting of police

misconduct to the independent Police Oversight Authority.

Section 108 (1) of this Act is unconstitutional since it attempts to take away the powers of the Inspector-General which is enshrined in the Constitution, through an Act of Parliament. The provision reads as follows;

> ***Section 108.(1)*** *The President may, on the application of the Government of a reciprocating country, order such number of police officers as the President may think fit to proceed to that country for service therein for the purpose of assisting the police service of that country in a temporary emergency.*

The Inspector-General has the independent command of the service pursuant to Article 245 (2) of the Constitution.

> ***Article 245. (2)*** *The Inspector-General— (b) shall exercise independent command over the National Police Service, and perform any other functions prescribed by national legislation.*

It is therefore unconstitutional to take away the powers of the Inspector General which are conferred upon him by the constitution. The provision should be amended to provide that the number of police officers should be determined by the inspector General and not solely by the president.

Section 109 (1) of the National Police Service Act 2011 violates Article 245 (2) of the Constitution (above) since it confers upon the president powers belonging to the Inspector-General by providing as follows;

> ***Article 109. (1)*** *The President may make application to the Government of a reciprocating country for police officers of that country to be sent to Kenya for service therein for the purpose of assisting the Service in a temporary emergency.*

Section 109 (1) should be amended by striking out the words 'the President' and replacing them with the words 'upon request of the Inspector General', immediately before the words 'the President may'. This change also has the effect of ensuring that the request is of a pressing need and the Inspector General is consulted.

ii.) The Official Secrets Act, Cap 187 Laws of Kenya

This is an Act of Parliament that was enacted to provide for the preservation of State secrets and State security in Kenya.[9]

9 See, *The Official Secrets Act*, the Preamble.

Article 33 of the Kenyan Constitution 2010 provides in categorical terms that all Kenyans have the freedom of expression and freedom to hold and impart opinions without any hindrance.[10] The right of the public to know is fundamental in any society that is governed by the rule of law. As Governments hold information in trust for the public, it follows that the public have the right of access to the information that the State holds.[11] Ostensibly Articles 35 and 33 must be read together.

> ***Article 35. (1)*** *Every citizen has the right of access to—*
> *(a) Information held by the State; and*
> *(b) Information held by another person and required for the exercise or protection of any right or fundamental freedom.*

However the Official Secrets Act operates to restrict such constitutionally guaranteed freedoms. The Act is restrictive in the sense that it limits the information that one can access. This piece of legislation was enacted to limit access by citizens to information that the government believed would compromise internal security.[12]

The Official Secrets Act is modeled on an English statute of similar name; the mischief which the statute aims to assault and address is the possibility of information getting into the hands of alien enemies. By the Act, it is an offence to approach or enter any 'prohibited place' — a term referring to places which are likely to contain security information — or to make any sketch or note or take any photograph which might be useful to an enemy.[13] It is also an offence for any person in government service, or who holds or has held a government contract, to communicate any information which he has obtained owing to the position he has or the contract he holds, to a person to whom he is not authorized to communicate it. Similarly, it is an offence for a person to receive such information, or to incite or attempt to procure another person to commit an offence under the act.[14] The penalty for these offences is up to 14 years imprisonment.

10 *The Constitution of Kenya*, Article 33.
11 Abuya E. '*Towards Promoting Access to Information in Kenya*', 2011
12 See, the preamble to this legislation, *"An Act of Parliament to provide for the preservation of State secrets and State security"*.
13 *The Official secrets Act*, Section 3
14 Ibid.

Section 3. (1) of Official Secrets Act, *Any person who, for any purpose prejudicial to the safety or interests of the Republic—*

(a) approaches, inspects, passes over, is in the neighborhood of or enters a prohibited place; or

(b) makes any plan that is calculated to be or might be or is intended to be directly or indirectly useful to a foreign power or disaffected person; or

(c) obtains, collects, records, publishes or communicates in whatever manner to any other person any code word, plan, article, document or information which is calculated to be or might be or is intended to be directly or indirectly useful to a foreign power or disaffected person, shall be guilty of an offence.

(2) any person who takes a photograph of a prohibited place or who takes a photograph in a prohibited place, without having first obtained the authority of the officer in charge of the prohibited place, shall be guilty of an offence.

(4) any person who, having in his possession or under his control any plan, article, document or information that relates to munitions of war, communicates it directly or indirectly to any foreign power, or to any other person for any purpose or in any manner prejudicial to the safety or interests of the Republic, shall be guilty of an offence.

(5) any person who receives any code word, plan, article, document or information, knowing or having reasonable grounds for believing at the time when he receives it, that the code word, plan, article, document or information is communicated to him in contravention of this Act, shall be guilty of an offence, unless he proves that the communication to him of the code word, plan, article, document or information was contrary to his wishes.

(6) any person who has in his possession or under his control any code word, plan, article, document or information of a kind or in the circumstances mentioned in paragraphs (a) to (d) inclusive of subsection (3) of this section, and who—

(a) communicates the code word, plan, article, document or information to any person, other than a person to whom he is authorized to communicate it or to whom it is his duty to communicate it; or

(b) retains the plan, article or document in his possession or under his control

when he has no right so to retain it or when it is contrary to his duty so to retain it, or fails to comply with all directions issued by lawful authority with regard to the return or disposal thereof; or

(c) fails to take reasonable care of, or so conducts himself as to endanger the safety of, the code word, plan, article, document or information, shall be guilty of an offence and liable to imprisonment for a term not exceeding five years.

(7) Any person who—

(a) allows any other person to have possession of any official document issued for his use alone, or communicates to any other person any code word so issued; or

(b) without lawful authority or excuse, has in his possession any official document or code word issued for the use alone of some person other than himself; or

(c) on obtaining possession of any official document by finding or otherwise neglects or fails to restore it to the person or authority by whom or for whose use it was issued or to a police officer, shall be guilty of an offence and liable to imprisonment for a term not exceeding five years.

The Official Secrets Act, Cap 187 maintains high levels of official secrecy, and thereby acts as a hindrance for the citizens to make well-informed decisions on the basis of participatory governance.[15] The Government's indifference to the constitutionally guaranteed freedom of information arises from its interpretation of the Right to Information as merely sub-text to the freedom of expression which itself is a much abused right, though guaranteed by the constitution.

Corruption makes the Official Secrets Act a farce as top-secret government information can easily be bought on inducement. According to the International Center for Policy and Conflict, unless there is a proper institutional framework to support the reinforcement of such a law, it will have little or no value. The system must pay heed to the protection of individuals, affordability, language diversity, mode of dissemination and a way of authenticating information. What makes freedom of information difficult is the fact that since Independence, the government has promoted a culture of secrecy and sycophancy, where civil servants have been

15 See, Kenya - The International Commission of Jurists Steps in, pg 1 at, http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/kenya/Kenya-The%20ICJ%20on%20FOI.pdf accessed on 18/1/2012.

encouraged to give their first allegiance to the President.

The Official Secrets Act should therefore be streamlined in accordance with the constitution of Kenya 2010 to render it more specific on criteria, procedure and time frame of classification and declassification of government secrets. This will ensure that the law is not misused for political or other interests different from those specified as the basis for exemption from disclosure.

iii.) The National Security Intelligence Act, No. 11 of 1998

The Constitution is the supreme law and it enshrines the principles, culture and values of the new democratic state. It also reflects the basic values of democracy and the economic and social principles for ensuring a cultured existence for all people.[16]

It therefore provides expressly for the setting up of intelligence services as part of the security system in the country while capturing statutes that describe in detail the role and functions of the intelligence services. Whilst operational techniques of covert collection of information are secret, the rest of intelligence activities should be open and above board. This reflects confidence that their objectives and policies are ethical and in accordance with fundamental human rights and freedoms.[17]
We have to establish and strengthen independent mechanisms of control of the civilian intelligence structures in order to ensure full compliance and alignment with the Constitutional principles and the rule of law, and particularly to minimize the potential for illegal conduct and abuse of power. The Constitution is the legal and legitimate framework because it is the supreme law that lays the foundation for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law.[18]

Constitution further ensures that the security services, and its membership, act in accordance within the confines of the Constitution. The national security must be pursued in compliance with the law, including international law; and that no member of any security service may obey manifestly illegal acts.[19]

The democratic accountability of the intelligence services to the civilian oversight bodies and the public has to be express and strong. The new NIS structures cannot operate in excessive secrecy anymore, which is inconsistent with the constitutional tenet that all spheres of government must be transparent and accountable.[20]

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16 Ndung'u Wainaina, '*NSIS Not Exempt From the Supreme Law*', 10/10/2011 at http://allafrica.com/stories/201110101549.html accessed on 19/1/2012.
17 ibid
18 Ibid.
19 Ibid
20 Ibid

The country is governed by law and not by fiat; making all persons and organizations, regardless of their status, position, power and function, bound by duly enacted and publicly promulgated laws and acknowledging that no person or organization is above the law.

The rule of law is not a philosophical abstraction. It is a product of bloody struggles waged by people against tyranny throughout the decades. It is deliberately intended to shackle rulers, state organs and public officers in order to prevent them from posing a threat to the freedoms and security of citizens.[21]

The motivation for the constitutional emphasis on the rule of law is heightened by Kenyans' experience of living in a society where the security services acted outside the realm of law. It is impermissible and untenable for a government department in a democratic country to adopt a position that is incontrovertibly illegal and even less tolerable for a department to adopt a policy position that permits illegality. This doctrine of the rule of law must also be construed within other constitutional doctrines of separation of power, parliamentary sovereignty and responsible government

The Constitution does not exempt the intelligence services from these principles. The National Security Intelligent Service (NSIS) cannot act or behave as though it is above the Constitution, only a rogue NSIS can create its constitutive law. If this occurs the drafted law will be void and will not have any status of law for having failed that procedural requirement.[22] Further, this defies the doctrine of conflict of interest and that no party can be a judge in its own case!

A Brief Assessment of the National Intelligence Service Bill 2011

The National Intelligence Service (NSIS) Bill 2011 is meant to repeal the NSIS Act of 1998 that established the current intelligence agency, and create a National Intelligence Service as outlined in section 242 of the new Constitution.

This draft National Security Bill 2011 could water down some of the *civil liberties* contained in the new Constitution if the Parliament passes it into law without amendments.

First, unlike other Bills proposed for enactment, the NSIS Bill will not go through the Cabinet for scrutiny. Second, the Bill has been drafted by the NSIS itself rather than by the concerned Ministry of State for Provincial Administration and Internal Security.

According to the new Constitution, any Bill is required to be participatory. The new Constitution contemplates a new era in which law making is a participatory process

21 Ibid
22 Ibid

involving all stakeholders and or interested parties.

> ***Article 118. (1)*** *of the Constitution, Parliament shall—*
> *(b) Facilitate public participation and involvement in the legislative and other business of Parliament and its committees.*
> *Article 196. (1) A county assembly shall—*
> *(b) Facilitate public participation and involvement in the legislative and other business of the assembly and its committees.*

It thus follows that the NSIS Bill if enacted will govern security issues which are paramount to all Kenyans, its development should be done in a participatory manner involving individuals and institutions at all levels. The NSIS Bill if enacted into law, it will contravene fundamental freedoms entrenched in the new Constitution and breed impunity.

The NSIS was supposed to be reformed as part of the ongoing Security Sector Reforms (SSR) that will include all security agencies including the police. Kenya has a chance to establish an intelligence agency that can deal appropriately with the country's security threats, including terrorism.[23]

According to Section 242 of the Constitution, the NSIS is responsible for security intelligence and counter intelligence to enhance national security, and is meant to perform any other functions prescribed by national legislation.

> ***Article 242. (1)*** *There is established the National Intelligence Service.*
> *(2) The National Intelligence Service—*
> *(a) is responsible for security intelligence and counter intelligence to enhance national security in accordance with this Constitution; and*
> *(b) Performs any other functions prescribed by national legislation.*

The NSIS Bill is further unconstitutional since it provides that once it comes into effect, individuals currently working for the agency will be taken on board without undergoing vetting like other public officers in other sectors.

> ***Section 4. (2)*** *All persons who were immediately before the commencement of this Act were members or employees of the National Security Intelligence Service established under the National Security Intelligence Service Act shall upon commencement of this Act become members of the Service and shall be deemed to have been appointed in accordance with this Act.*

23 African Media News, *Kenya: New security Bill Smuggled in – Civil Society and media caught napping,* at http://fesmedia.org/african-media-news/detail/datum/ accessed on 29/9/2011.

The Constitution provides that all appointments for public officers shall be done in accordance with the Constitution and it prescribes principles that should govern these appointments.

> ***Article 232. (1)*** *The values and principles of public service include—*
> *(e) accountability for administrative acts;*
> *(f) transparency and provision to the public of timely, accurate information;*
> *(g) subject to paragraphs (h) and (i), fair competition and merit as the basis of appointments and promotions;*
> *(h) representation of Kenya's diverse communities; and*
> *(i) affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of—*
> *(i) men and women;*
> *(ii) the members of all ethnic groups; and*
> *(iii) Persons with disabilities.*

The Bill also limits audit only to administration and policy, and restricts any attempt to scrutinize the agencies operations. Additionally, contrary to demands for transparency, the Bill states that the committee's meetings will not be open to public and their deliberations cannot be published.

The Bill also has *archaic* and unconstitutional provisions such as prohibiting photography around the agency's premises. These laws have been overtaken by technological advancements like publicly available high-resolution satellite imagery.

> ***Section (3)*** *Any person who-*
> *(ii) takes a photograph of a prohibited land or premises of the Service or who takes a photograph in a prohibited land or premise of the Service without having first obtained the authority of the Director General commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding two years or a fine not exceeding three hundred thousand shillings, or to both.*

This unconstitutional provision is restrictive since it may operate to limit the right to access information.

Nonetheless, the draft Bill has many new features that if implemented could dramatically change the way the agency has been operating in the past under the to-be-repealed legislation. It has for the first time included anti-terrorism as part of NSIS functions.

The appointment of the director-general will be approved by parliament, unlike before when the president had unfettered powers to appoint whom he liked. This will

prevent a repeat of previous appointments that were based on political and ethnic patronage. The new requirements are that the director-general must have a university degree, a minimum of 10 years experience in security and intelligence matters, experience in public management, and must meet the requirement of Chapter 6 of the Constitution, which requires integrity in all public officers. The director will also have security of tenure and can only be removed by the president on grounds of violation of the Constitution but after recommendation from a commission of inquiry.

One other improvement is that the draft Bill calls for political neutrality on the part of the director-general, unlike in the past where the agency was used to further the political interests of the government in power.

Further, the draft Bill outlaws torture, cruel or degrading treatment; any NSIS officer who commits this offence is liable to imprisonment for two-and-a-half years or a fine of Ksh300, 000 ($3,000). There is also a Complaints Commission where citizens can file their complaints against the service.

The director general will be obligated to seek warrants from a high court judge before carrying out overt actions. But on the other hand, the Bill grants authority to the director to covertly order raids, confiscate equipment, and spy on its citizens without consent.

B. Under Chapter: Xii. Public Finance

i.) The Constituency Development Fund Act, 2003

The Constituency Development Fund Act, 2003[24] became law on 31st December 2003 upon receiving presidential assent. The Act was expressed to come into force by notice. The objective of the Act, to be gleaned from the preamble is to provide the establishment of the Constituency Development Fund and for connected purposes.

Inherent Defects within the Constituency Development Funds Act

Save for the compliance with Article 94 of the Constitution, which shows that parliament exercises powers vested in it under the Constitution in legislating the C.D.F Act, the entire statute is largely wanting in terms of accommodation of constitutional principles.

- **The Act does not Respect constitutional ideas in relating to devolution.**

A constitution by its very nature is an agreement on how people in a given place would like to live together, promote and advance their interests, and protect those interests from all types of threats. That agreement is often based on a realization that the people of diverse characteristics live together in a particular territory.[25]

24 Act No. 10 of 2003.

25 Macharia Munene, *'The manipulation of the Constitution of Kenya, 1963-1996'*: A Reflective Essay, an Article originally prepared at the Law Society of Kenya Annual Conference on "CONSTITUTIONAL REFORM IN KENYA" Naivasha,

The constitution, generally speaking, is meant to, among others, achieve the following:

- ❖ Create government
- ❖ Define levels of government
- ❖ Assign functions to the levels of government
- ❖ Ensure that institutions of governance at every level are held responsible to the people
- ❖ Allocate resources

Each level of government that has been assigned a function ought then to perform the functions allocated to it, without unduly meddling into or interfering with the other levels.[26]

For devolution of power to succeed, it must be founded on the constitution and not just on statute. This is more so in a country that purports to uphold constitutional supremacy over either parliamentary supremacy or the supremacy of any other organ of the state. The concept of devolution of power demands that there be separate levels of governance, these are;

- National level – in which generally the National Assembly (hence members of parliament) would fall; and
- The local level.

Involving the Members of Parliament who are at the national level, in the control and management of the CDF, which targets and is for the benefit at the local level is a violation of the above stated ideal of devolution. This is more so considering that it is the MPs who legislated the statute hence there are real conflicts of interest. It is worth noting that Mps still reserve the power to amend the statute.

- **The Fund has no "Specific development agenda" hence it stands as a political unit**

There is no precise development function spelt out for the Constituency Development Fund. Take for instance, provision of water services. If the residents of a specific constituency have a deficiency of waters supply, do they call upon the city council of Nairobi, The Ministry of water and natural resources, or the specific Constituency Development Fund committee to address the issue? It is a tacit constitutional principle of resource allocation that the money should be allocated to purely functional units of governance. It is nearly impossible to evaluate and monitor the use of funds allocated to the CDF.

- **Lack of proper governance and accountability systems**

The system under the CDF currently subsisting has great democratic deficits. We have a situation where a sitting member of parliament who is a member and chairman of the CDF handpicks people from the constituency into membership of the committee. These people are answerable to him.

Kenya, February 28, 1997.

26 Ongonya Z.E and Lumallas E, *'A Critical Appraisal of the Constituency Development Fund Act'* 2005, p 4

As far as the Constitution goes, the work of the arm of government that is the Legislature is formulation of policies, law making and acting as a check to the Executive and Judiciary.

In a system where the legislator makes a law [**'the CDF Act' herein],** is active in implementing the law and accounts the expenditure to the National Assembly, such scenario implies that the legislator is participating in auditing himself through the parliamentary committee. This way, democratic accountability goes overboard without a whimper.

- **The Doctrine of Separation of powers**

The country generally lacks a proper structure of devolution of powers. The situation is not made any better by the evolution of the CDF from the woodworks. The Act grossly renegades on the traditional and noble principle of separation of powers. This principle has over the centuries emerged as bedrock of democracy and constitutionalism.

The principle requires that the Government be divided into different branches each with it's clearly spelt out powers and functions. It finds the main arms of the government as threefold: The Executive, The Judiciary and the Legislature. It then requires that each arm of government be accorded its specific functions, entrenched in the basic law of the land[27] and each to be *limited to the exercise of its "proper function"* and the balance was completed by allowing each arm a limited right of interference in the functions of the other in order to prevent the encroachment of any one of them upon the function any other.
The rationale behind separation of powers is that if two or three functions of Government above, are exercised by only one organ of the Government then such government would be arbitrary.

A logical deduction following the doctrine is that since the arms of Government are creations of the constitution, they can *only* be subordinate to it. To borrow a passage

> *It is clear that if parliament is to claim and protect its powers and internal procedures, it must act in accordance with constitutional provisions which determine its composition and the manner in which it must perform its functioning. If it does not do so, then any purported decision made outside these constitutional provisions is null and void and may not be claimed to be an Act of parliament.*

from the Ugandan case of *Paul Ssemogerere & Zachary Olum Vs the Attorney general*[28]

27 The Constitution of our jurisdiction
28 Constitutional Appeal No 1. 2000, at page 14, also cited with approval in Republic Vs Roads Board ex parte John

The constituency Development Fund defies this principle.

The constituency Development Fund Act under section 23(1) allows sitting MPs to be members of the Constituency Development Committee **(CDC].** The MPs are mandatorily required to constitute and convene the CDC within the first thirty days of the new parliament and shall have a maximum of fifteen members who *shall* in terms of section 23(1) comprise of:

> ***Section 23 (1).*** *(CDFA), There shall be a Constituency Development Committee for every constituency which shall be constituted within the first thirty days of a new Parliament comprising of –*
>
> *(a) the elected member of Parliament for the constituency;*
> *(b) all councilors in the constituency;*
> *(c) the District Officers of each of the divisions in the constituency;*
> *(d) the Divisional Community Development Officers in the constituency;*
> *(e) two persons representing religious organizations in the constituency;*
> *(f) three women representatives from the constituency;*
> *(g) one person nominated from amongst non-governmental organizations in constituency, if any;*
> *(h) the district Development Officer who will be secretary and convener of the Committee;*
> *(i) heads of the relevant Government Departments in the district; and*
> *(j) one person representing the youth in the constituency*

ii.) Commission on Revenue Allocation Act 2011

The term revenue has been defined under Section 2 of the Act to mean all taxes imposed by the national government under Article 209 of the Constitution and any other revenue (including investment income) that may be authorized by an Act of Parliament, but excludes revenues referred to under Articles 209(4) and 206(1) (a) (b) of the Constitution.

The concept of defining the term revenue is a fundamental issue which forms the backbone of Chapter 11 and 12 of the Constitution in the context of Devolution and Revenue sharing. The existence and survival of the county government will be heavily dependent on the revenue received from the nationally raised revenue hence it is fundamental that the term revenue be given a liberal meaning. The definition contemplated under section 2 of the Commission on Revenue Allocation Act 2011 should thereby be amended by substituting the word "**means"** with the word **"include".** By doing so the term revenue acquires a broad definition and is not therefore limiting as currently is.

Section 5 of the Act provides for the appointment of the members of the Commission.

Harun Mwau, Nairobi High Court Miscellaneous Civil application No. 1372 of 2000.

Under subsection 2 the mandate of the members of the commission is limited contrary to the unlimited discretion guaranteed under Article 250 (5) of the Constitution. The flawed section reads as follows; "*The chairperson and members of the Commission shall, pursuant to Article 250(5) of the Constitution, serve on a part-time basis*." This subsection should be removed or amended to avoid the conflict it creates with Article 250 (5) of the constitution.

Section 5 (3) further violates the spirit of the Constitution by providing that the chairperson and members of the Commission shall be non-executive and shall perform their functions in accordance with Article 216 of the Constitution. This subsection undermines in its entirety the spirit of the Constitution as envisaged under Chapter 15. Consequently, this provision should be deleted lest it may incapacitate the Commission's ability to carry out its mandate.

iii.) The Public Financial Management Bill 2011

This Bill will provide for an Act of Parliament to provide for management of the public finances of the republic of Kenya by the national government and county government in a manner that is responsible, transparent and accountable.

A public financial management law provides the framework for managing public finance in Kenya because it concerns the leadership, use and control of public revenues, expenditure, liabilities and assets. Owing to the constitutional requirement for two levels of government in Kenya, the situation demands the creation of a consolidated legislation for undertaking the tasks outlined above in the form of an Organic Budget Law (OBL). This consolidation would raise the chances of internal consistency, implementation and compliance.

The International Center for Policy and Conflict believes that power and resources must be used in a manner that reflects integrity and responsibility. It is only through accountable and responsible governance that human rights can be protected and enjoyed by all Kenyans.[29]

The public finance law is expected to maintain strict fidelity to the principles and frameworks of Public Finance in Article 201 of the Constitution.

29 The Kenya National Commission on Human Rights, *Bills Update*, October 2011.

Article 201. *of the Constitution, The following principles shall guide all aspects of public finance in the Republic—*

(a) there shall be openness and accountability, including public participation in financial matters;

(b) the public finance system shall promote an equitable society, and in particular—

(i) the burden of taxation shall be shared fairly;

(ii) revenue raised nationally shall be shared equitably among national and county governments; and

(iii) expenditure shall promote the equitable development of the country, including by making special provision for marginalized groups and areas;

(c) the burdens and benefits of the use of resources and public borrowing shall be shared equitably between present and future generations;

(d) public money shall be used in a prudent and responsible way; and

(e) Financial management shall be responsible, and fiscal reporting shall be clear.

The ICPC has great concerns and would recommend amendments to clauses on the modalities of giving, receiving and documenting public feedback, details of standards and accounting, budget classification, style of budgeting, and details on managing public assets and liabilities should not be included in the PFM law. These should properly be left to secondary legislation that will be linked to the OBL.

In conclusion, Chapter Twelve of the Constitution has revolutionized public finance management in Kenya. The role of the draft PFM Bill is to capture the spirit and provisions of the Constitution, while also providing a framework for PFM in Kenya. Such a law, most preferably an organic law, should reduce inefficiencies, increase participation and transparency in implementation and therefore yield better results. The process of developing the law is also important. Challenges in developing the PFM bill 2011 indicate that there is great need for better communication from variety of public offices, information, co-ordination and participation with the public. Overall, Kenya must make the most of this opportunity to develop a good PFM law that satisfies benchmarks in the Open Budget Index (OBI) amidst other international best practices.

C. Under Chapter: Vi. Leadership and Integrity

i) Ethics and Anti Corruption Commission Act 2011

This is an Act of Parliament for combating corruption and connected purposes. This

Act repeals the Anti Corruption and Economic Crimes Act (ACECA**)** this complements the rigors as set out by Chapter Six of the Constitution.

The Constitution in Article 76 (2) prohibits state officers from holding bank accounts

> ***76. (2)*** *of the Constitution states, A State officer shall not—*
> *(a) maintain a bank account outside Kenya except in accordance with an Act of Parliament; or*

outside Kenya and directs parliament to enact legislation to regulate this.

ICPC is of the view that the legislation envisaged under this provision is the Ethics and Anti-Corruption Commission Act and it has to accommodate diplomatic staff representing our country in foreign capitals and similar officials by facilitating their operating bank accounts outside Kenya. In this globalized economy there can be many legitimate purposes requiring state officials to hold bank accounts outside the country. As it is today and in the absence of the said legislation, these officers are in contravention of the Constitution.

The Ethics and Anti Corruption Commission Act 2011 should also be amended to set out provisions on asset recovery and forfeiture. The High Court of Kenya in the case of ***Kenya Anti-corruption Commission Vs. Stanley Mombo Amuti***[30] held that the provisions of section 55 (5) and (6) of the Anti Corruption and Economic Crimes Act

> ***55 (5).*** *If after the Commission has adduced evidence that the person has unexplained assets the court is satisfied, on the balance of probabilities, and in light of the evidence so far adduced, that the person concerned does have unexplained assets, it may require the person, by such testimony and other evidence as the court deems sufficient, to satisfy the court that the assets were acquired otherwise than as the result of corrupt conduct.*
>
> *(6) If, after such explanation, the court is not satisfied that all of the assets concerned were acquired otherwise than as the result of corrupt conduct, it may order the person to pay to the Government an amount equal to the value of the unexplained assets that the Court is not satisfied were acquired otherwise than as the result of corrupt conduct.*

were unconstitutional. These provisions read as follows;

These were the provisions allowing the commission to recover illicitly obtained and unexplained assets. The court was of the view that Parliament should amend the law to make these provisions respect the Bill of Rights. The Act should therefore be amended to include provisions on asset recovery and forfeiture to comply with the

30 Civil Suit No 448 of 2008

Constitution.

D. Under Chapter: Iv. Bill of Rights

i.) The Prisons Act Cap 90 Laws of Kenya

The Prisons Act has provisions permitting solitary confinement which is inhuman. Today, solitary confinement is typically referred to as segregation.[31] Prisoners

> ***Section 56 of what. (Cap 90)*** *Whenever it appears to the officer in charge that it is desirable for the good order and discipline of the prison for a prisoner to be segregated and not to work nor to be associated with other prisoners, it shall be lawful for such officer to order the segregation of such prisoner for such period as may be considered necessary.*

subjected to extensive segregation in Secure Housing Units (SHUs) have additional difficulties severe enough to cause near permanent mental and emotional damage.[32]

A number of international treaties and declarations establish the scope of prisoner rights. Signatories to such documents are expected to not only respect the established rules of law created therein, but also to encourage systems of dignity and respect for human life.[33] In essence, by signing international treaties, especially those of a self-executing nature,[34] governments explicitly agree to regulation of their actions and balancing of government interests with that of individual liberties.[35]

Currently, Kenya is a signatory to numerous treaties, which incorporate international human rights standards that originated from non-binding legal principles; these non-binding principles provided legitimacy in form rather than substance.[36] The degree of protection afforded to prisoners has increased significantly since the creation of the United Nations Charter ("U.N. Charter") in 1945.[37] The U.N. Charter represented an initial recognition of individual rights that served to legitimize the United Nations as not only a guarantor of government oversight, but also as an innovative international coordinator of democratic ideals.[38] Though there is no specific language addressing

31 Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement,* 23 N.Y.U. REV. L. & SOC. CHANGE 497 (1977) (quoting TORSTEN ERIKSSON, THE REFORMERS, AN HISTORICAL SURVEY OF PIONEER EXPERIMENTS IN THE TREATMENT OF CRIMINALS 49 (1976)).

32 *See* Haney & Lynch, ibid, at 534 (noting that the risk of permanent damage is greater for inmates with preexisting psychological impairments).

33 Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?,* 90 CORNELL L. REv. 97, 109-10 (2004).

34 *See generally id.* at 125-26.

35 *See* U.S. CONST. art. VI: Vienna Convention on the Law of Treaties art. 2, May 23, 1969, 1155 U.N.T.S. 331

36 *See* Nan D. Miller, *International Protection of the Rights of Prisoners: Is Solitary Confinement in the United States a Violation of International Standards?,* 26 **CAL.** W. INT'L L.J. 141 (1995).

37 The U.N. Charter

38 *See id.* pmbl. (setting forth as its goals, inter alia, the reaffirmation of "faith in fundamental human rights, in the

the rights of prisoners, Article 55 of the U.N. Charter, by promoting "universal respect for, and observance of, human rights and

fundamental freedoms for all without distinction as to race, sex, language, or religion," makes clear a general standard of rights applicable to all individuals.[39]

Thereafter, in 1948, the Universal Declaration of Human Rights ("Universal Declaration") further illuminated the importance of recognizing human rights.[40] Article 5 of the Universal Declaration specifically states that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[41] Although neither of these initial human rights documents was legally binding, they were generally accepted as part of customary international law.[42]

Article 25 of the Constitution of Kenya 2010 also guarantees the freedom from torture and cruel, inhuman or degrading treatment or punishment.

> ***Article 25. of the Constitution***
> *Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—*
> *(a) freedom from torture and cruel, inhuman or degrading treatment or punishment;*

Section 56 of the Prisons Act should be amended to ensure that it conforms with human rights standards as set out in International human Rights Instruments and the Constitution of Kenya 2010.

ii.) The Sexual Offences, Act No 3 of 2006

The Sexual Offences Act of 2006 is an Act of Parliament that was enacted to make provision about sexual offences, their definition, prevention and the protection of all persons from harm from unlawful sexual acts, and for connected purposes.[43] This Act sought to consolidate and repeal provisions regarding sexual offences which were previously contained in scattered legislation.

The Constitution of Kenya is the supreme law of the country and Article 2 (4) provides

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dignity and worth of the human person, [and] in the equal rights of men and women and of nations large and small").

39 *Id.* Art. 55(c)

40 *See* Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (1948) [hereinafter Universal Declaration].

41 *Id.* Art. *5.*

42 *See* Miller, *supra* note 16, at 141; *see also* Suzanne M. Bernard, *An Eye for an Eye: The Current Status of International Law on the Humane Treatment of Prisoners,* 25 RUTGERS L.J. 759, 769 (1994) (noting how the Universal Declaration carries "great weight and may be taken as evidence of binding customary international law").

43 *The Sexual Offences, Act No 3 of 2006*, see Preamble.

that any law, including customary law that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.

The Constitution provides further, under the provisions on fair hearing, that:

> ***Article 50 (2) of the constitution of Kenya 2010,*** *states, Every accused person has the right to a fair trial, which includes the right—*
>
> *(n) not to be convicted for an act or omission that at the time it was committed or omitted was not—*
>
> *(i) an offence in Kenya; or*
>
> *(ii) a crime under international law;*
>
> *(p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and*

Retrospective criminal laws are prohibited under International law.[44] Legislation will be considered to be retrospective if its provisions:[45]

- creates an offence for acts done before the legislation commences
- expands the range of activities that are covered by an existing criminal offence, or
- Increases the maximum or mandatory punishment (term of imprisonment or monetary penalty) available for persons who have already been convicted of a criminal offence.

The prohibition may also be relevant where legislation is contemplated that:[46]

- amends criminal law procedure that applies to trials for acts done before the legislation commences
- introduces new sentencing options that apply to acts done before the legislation commences, or
- Changes parole conditions that apply to sentences of imprisonment imposed before the legislation commences.

The Sexual Offences Act can be considered as a retrospective criminal legislation since it provides under Provisions 1 and 3 of the First schedule that:

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44 The prohibition on retrospective criminal laws is contained in article 15 of the International Covenant on Civil and Political Rights (ICCPR).

45 Australia Human Rights Programme, *The Prohibition on Retrospective Criminal Laws,* Public Sector Education Programme at http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/ accessed on 3/1/2012.

46 Ibid.

First Schedule, Transitional Provisions

1. Notwithstanding the provisions of any other Act, the provisions of this Act shall apply with necessary modifications upon the commencement of this Act to all sexual offences.

3. Any proceedings commenced under any written law or part thereof repeated by this Act shall, so far as practicable, is continued under this Act.

The ICPC is of the opinion that these transitional provisions render the Sexual offences Act a retrospective criminal legislation and thus unconstitutional. In fact, International law recognizes prohibition on retrospective criminal laws to be an absolute right.[47] It is our view that, the import of this provision is to have the sentence to be meted out be the one prescribed under the Sexual Offences Act, the then existing cases or offences committed before the repeals of the sections of other written laws, would have been tried under section 23 (3) [d] and (e) of Interpretation and General provisions Act, Cap 2 laws of Kenya. This section provides;-

Section 23 (3). *Where a written law repeals in whole or in part another written law, then, unless a contrary intention appears,, the repeal shall not-*

(e) affect an investigation, legal proceeding or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealed written law had not been made.

iii.) The Penal Code (Cap 63 Laws of Kenya)

The crimes against people, property, and penalties associated with them

The Penal Code (Chapter 63 of the Laws of Kenya) is one of the substantive laws in Kenya pertaining to crimes against people and property, and also prescribes penalties associated with such crimes. It is the law that provides for the general criminal law framework. This law defines offences as either misdemeanors or felonies and prescribes the penalties thereof.

The Kenyan Penal Code, Chapter 63 of the Laws of Kenya prohibits the commission of any act of gross indecency between any male persons under section 165. The penalty prescribed is five years imprisonment. Women are not explicitly mentioned but the

47 See Article 4 of the ICCPR, "countries may take measures derogating from certain of their obligations under the Covenant 'in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed'. However, the prohibition on retrospective criminal laws is specifically excluded from the obligations from which derogation is permitted.

law which prohibits unnatural sexual practices can be interpreted to be used against same sex relations between women as well. There is no provision in the Penal Code providing for female persons who commit similar Acts of gross indecency.

> ***Section 165.*** *Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony and is liable to imprisonment for five years.*

The Constitution of Kenya adopted in August 2010, forbids discrimination on a number of grounds which includes discrimination on the ground of sex.

> ***Article 27 (4)*** *The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.*

Section 165 can therefore be said to be discriminatory against the male persons. It should be amended to ensure that it complies with Article 27 of the Constitution which prohibits discrimination.

Crimes that result in the death of a person may be charged as murder or manslaughter. To sustain a charge of murder, the prosecution must establish that the accused had malice aforethought. It is punishable by death. The Penal Code retains provisions that provide for death sentence despite the fact that provisions of International law are against this form of punishment. Capital offences which death penalty still applies in Kenya include: Treason, Murder, Attempted Murder, Robbery with Violence and attempted Robbery with violence. Most of the death row inmates are still waiting for their day with the hangman.

> ***Article 204 .of the Constitution of Kenya 2010,*** *person convicted of murder shall be sentenced to death.*
> *Article 296.*
> *(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.*
> *(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.*

The Constitution of Kenya 2010 provides under Article 2 (6) that any treaty or convention ratified by Kenya shall become a part of Kenyan Law.

> ***Article 2 (6)*** *Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.*

The imposition of the death penalty involves the violation of a number of internationally guaranteed human rights. These include the right not to be arbitrarily deprived of one's life, and a range of specific procedural and other rights that must be observed in any case in which the death penalty is imposed. The imposition of the death penalty may also violate other rights, such as the right not to be subjected to cruel, inhuman or degrading treatment or punishment, fair trial rights, the right to equality and non-discrimination and the freedom of opinion or expression. This section focuses on the right to life and the specific requirements relating to the death penalty.

Death Penalty and Human Rights Standards
Over two-thirds of the countries in the world – 139 – have now abolished the death penalty in law or practice.
1948
The United Nations adopted without dissent the Universal Declaration of Human Rights (UDHR). The Declaration proclaims the right of every individual to protection from deprivation of life. It states that no one shall be subjected to cruel or degrading punishment. The death penalty violates both of these fundamental rights.
1966
The UN adopted the International Covenant on Civil and Political Rights (ICCPR). Article 6 of the Covenant states that "no one shall be arbitrarily deprived of his life" and that the death penalty shall not be imposed on pregnant women or on those who were under the age of 18 at the time of the crime. Article 7 states that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."
1984
The UN Economic and Social Council (ECOSOC) adopted "Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty." In the same year, the Safeguards were endorsed by consensus by the UN General Assembly. The Safeguards state that no one under the age of 18 at the time of the crime shall be put to death and that anyone sentenced to death has the right to appeal and to petition for pardon or commutation of sentence.

1989
The UN General Assembly adopted the Second Optional Protocol to the ICCPR. Its goal is the abolition of the death penalty.

1990
The Protocol to the American Convention on Human Rights was adopted by the General Assembly of the Organization of American States. It provides for the total abolition of the death penalty, allowing for its use in wartime only.
1993
The International Criminal Tribunal for the Former Yugoslavia stated that the death penalty is not an option, even for the most heinous crimes known to civilization, including genocide.
1995
The UN Convention on the Rights of the Child came into force. Article 37(a) prohibits the death penalty for persons under the age of 18 at the time of the crime.
1999
The UN Commission on Human Rights (UNCHR) passed a resolution calling on all states that still maintain the death penalty to progressively restrict the number of offenses for which it may be imposed with a view to completely abolishing it.
2002
The Council of Europe's Committee of Ministers adopted Protocol 13 to the European Convention on Human Rights. Protocol 13 is the first legally binding international treaty to abolish the death penalty in all circumstances with no exceptions. When it was opened for signature in May 2002, 36 countries signed it.
2005
The UNCHR approved Human Rights Resolution 2005/59 on the question of the death penalty, which called for all states that still maintain the death penalty to abolish the death penalty completely and, in the meantime, to establish a moratorium on executions.
2007
The UN General Assembly (UNGA) approved Resolution 62/149 which called for all states that still maintain the death penalty to establish a moratorium on executions with a view to abolishing the death penalty.

The provisions relating to imposition of capital punishment in the Penal Code should be amended and the already issued sentences be commuted into life sentences, thereby ensuring compliance with International Human Rights Treaties and Conventions.

Despite the Penal Code having provisions warranting the execution of the death

penalty, the government of Kenya has put in place a *de facto* moratorium on the death penalty.[48] In February 2003, the president suspended the hanging of those condemned to death, and ordered the release of 281 long term prisoners on death row and commuted to life, the sentences of 195 others.[49] The ICPC is of the opinion that this situation is not satisfactory, the most humane option would be to have the Constitution amended to have a clear provision on this issue.

E. State and The Executive Branch

The Election Act 2011 is crucial as it gives the guiding principles and rules that are used in giving raise to crucial institution within the framework of the doctrine of separation of power. Periodic election a fundamental right to the citizenry as it affords them a chance to replace their governance. An election can result to a complete overhaul of the entire executive arm of the government. The Act draws its inspiration from Chapter (iiv) of the Constitution

The Elections Act, 2011 was passed by Parliament as part of the ongoing Constitutional Implementation legislative programme. Its principle functions are; to provide for the conduct of elections to the office of the president, the national assembly, the senate, county governor and county assembly; to provide for the conduct of referenda; to provide for election dispute resolution and for connected purposes.[50]

The debate associated with enacting laws aimed at implementing the new Constitution has put at risk the elections which are set to be held in August 2012 and also the constitutionality of the provisions of these new laws which are either in conflict with the letter and the spirit of the Constitution or are in conflict with the spirit of the Constitution. The Commission for the Implementation of the Constitution (CIC) for instance believes that changes to the Elections Act which were introduced in Parliament and others by the Government Printer have rendered the Elections Act as it is unconstitutional.[51]

The brutal aftermath of the Kenyan elections in the late 2007 and early 2008 should be a pointer as to the importance of having reliable legislation and credible elections body that infuses public confidence in the electoral process and outcome.

In 2008, the President appointed a Commission (the Kriegler Commission) to inquire into all aspects of the 2007 General elections and especially the Presidential elections. One of the Commission's terms of reference was to analyze the constitutional and

48 Republic Of Kenya, *Statement By The Minister For Justice, National Cohesion And Constitutional Affairs, Hon. Martha Karua, Egh, At The Presentation Of Kenya's Initial Report Under The Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment,* Geneva, 13th – 14th November 2008, p4.

49 Ibid.

50 See the Preambular Clause of the *Elections Act* 2011.

51 *The Star* Newspaper; "Nyachae Insists on 30 Changes to the Elections Act" at http://www.the-star.co.ke/ accessed on 14th October 2011

legal framework and identify weaknesses and inconsistencies in the electoral laws.[52] In its findings, the Commission reported that the Kenyan legal framework governing elections contains a number of weaknesses and inconsistencies that weaken its effectiveness in guiding the electoral process. It recommended the need for legal reform to address these weaknesses and inconsistencies.[53]

Since the Kriegler report, there has been a review of various legislations governing the electoral process in Kenya including the Constitution of Kenya and also the recent Elections Act which was passed into law in 2011.

While the new Election's Act was aimed at cleaning up the perennial elections chaos that have been witnessed in Kenya in the past , this new poll law falls far short of the high standards established by the new Constitution. The Act was hurriedly crafted to beat the Constitutional deadline and in its current status, it can be said to be a chronicle of the vested interests of the current Members of Parliament which they have protected to the full.

Section 15 (1) of the Elections Act for instance, provides that;

> ***Section 15. (1)*** *A presidential candidate or a political party shall not at any time change the person nominated as a deputy presidential candidate after the nomination of that person has been received by the Commission:*
> *Provided that in the event of death, resignation or incapacity of the nominated candidate or of the violation of the electoral code of conduct by the nominated candidate, the political party may substitute its candidate before the date of presentation of nomination papers to the Commission.*

The provision contradicts and makes some penalties ineffective, specifically the punishment for violation of elections code of conduct and Articles 81, 84, and 91 of the Constitution. Article 138 (8) (b) specifies that in the event of death of a presidential or deputy presidential candidate, an election shall be cancelled and a new election held.

> ***Article 138. (8)*** *A presidential election shall be cancelled and a new election held if—*
> *(b) a candidate for election as President or Deputy President dies on or before the scheduled election date;*

The amendment made to Section 34 (9) of the Elections Act was a blow to the public

52 Gazette Notice no 1983 of 2008.

53 Recommendations in the report by the Independent Review Commission (IREC) {Kriegler Commission} on various aspects of the 2007 General elections submitted to the President on 17th September 2008.

since it allowed losers in the presidential election to be eligible for nomination to Parliament through the Party Lists. The legislation was intercepted between the State Law Office and the Government Printer and altered to read:

> ***Section 34 (9)*** *The party list may not contain a name of any Presidential or Deputy Presidential candidate nominated for an election under this Act.*

The principle intention of the original section 34 (9) of the Act, which disallowed losers in the presidential election to be eligible for nomination to Parliament through Party Lists, was to promote the representation in Parliament through nomination of women, persons with disability, youth, and marginalized communities as contemplated under Article 90 of the Constitution. The provision as is currently may be employed to reward cronies thus defeating the need of the nominations through Party Lists as intended by Article 90 of the Constitution.

Section 39 (2) of the Elections Act violates the Constitutional provision in Article 86.

> ***Section 39 (2)****. Before determining and declaring the final results of an election under subsection (1), the Commission may announce the provisional results of an election.*

The Elections Act under section 39 (2) provides that:

> ***Article 86.*** *At every election, the Independent Electoral and Boundaries Commission shall ensure that—*
>
> *(b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;*
>
> *(c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer;*

This provision violates Article 86 (b) and (c) of the Constitution which provides that;

At every election, the Independent Electoral and Boundaries Commission shall ensure that—

> ***Section 45 (3).*** *of the Election Act, A recall of a Member of Parliament under subsection (1) shall only be initiated upon judgment or findings by the High Court confirming the grounds specified in subsection (2).*

The use of the word **"shall"** in the above two constitutional provisions suggest that

the announcement of provisional results by the Commission is not optional.

Section 45 (3) of the Elections Act provides that;

This particular provision violates the Constitutional provisions as to the sovereign power of the people as enshrined in Article 1 of the Constitution. In addition, the provision limits the Constitutional right of the electorate to recall as provided for under Article 104 (1) of the Constitution in the following terms;

> ***Article 104 (1).*** *The electorates under Articles 97 and 98 have the right to recall the Member of Parliament representing their constituency before the end of the term of the relevant House of Parliament.*

The Constitutions thus vests the power to recall an MP on the people, and if all the requirements set out are met then a recall election should be held.

Section 45 (4) of the Act provides that "a recall under subsection (1) shall only be initiated twenty-four months after the election of the Member of Parliament and not later than twelve months immediately preceding the next general election. This statutory provision violates the right guaranteed under Article 104 of the Constitution which provides that the electorates' right to recall a member of parliament may be exercised any time before the end of the term of the relevant House of Parliament.

The Constitution of Kenya under Article 48 guarantees access to justice for all Kenyans in the following terms;

> ***Article 48.*** *The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.*

However, Section 78 (2) of the Elections Act prescribes a fee of Sh. 1 million for a presidential petition, Sh. 500,000 for an MP petition or county governor, and Sh. 100,000 for county assemblies.

> ***Article 78 (2)*** *A person who presents a petition to challenge an election shall deposit—*
>
> *(a) one million shillings, in the case of a petition against a presidential candidate;*
>
> *(b) five hundred thousand shillings, in the case of petition against a member of Parliament or a county governor; or*
>
> *(c) one hundred thousand shillings, in the case of a petition against a member of a county assembly.*

This fees as prescribed in the Act are` too prohibitive to the ordinary Kenyan citizen and could be a violation of access to justice under Article 48 of the Constitution.

4. CONCLUSION

The complete implementation of Kenya's Constitution that was made by Kenyans is expected to put in place several reforms. Some of these are; considerable changes in the country's governance structure, a broader concept of human rights, transparency in public positions appointment, entrenched institutional independences, devolution of power and guaranteed checks and balances on the executive.

However, the process of implanting the Constitution is facing several setbacks. For example it was noted that the parliament passed 15 Bills in the last month of the August 27th deadline, while during the previous 11 months since the Constitution was promulgated; only 11 Bills were passed. This can be attested to several factors such as delays in the process of drafting the Bills which seems to lack a strategic and focused approach, poor coordination between and among various actors, interference and rollback attempts from vested interests and lack of commitment for Constitutional implementation.

This led to producing low quality bills, leaving them to further legal challenges. This we hope will not be repeated on the bills that are supposed to be put into legislation by 27 February 2012 and in future. As the Commission for the Implementation of the Constitution recommends, the process of implementing the Constitution will be achieved when all the implementing agencies and stakeholders including the political elites start working harmoniously. This will also guard the sovereign power of the people of Kenya that is exercised through the Constitution.

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International Center for
Policy and Conflict

13th Floor, Ambank House
Utalii Lane Off University Way
P.O Box 44564 - 00100, Nairobi, KENYA
Tel: +254-020- 2473 042
Email: admin@icpcafrica.org
icpc.afric@gmail.com
Website: www.icpcafrica.org